

The District Attorney: His Difficulties

By ARTHUR TRAIN.

OUT of all the multifarious sins and wickednesses that are brought to his notice the District Attorney must cull such as are crimes, and then decide whether or not to prosecute them. If he bothered himself with every trifling offense he could doubtless occupy his full time with the horrors of exhortation alone. But the District Attorney can no more prosecute all violations of law than can the police arrest all the violators. They do the best they can, marching round and round like the supers in a stage army, to create the impression of numbers, cover all the territory possible and hit a head when they happen to see one. They have got to stop burglary, arson, and at the same time enforce the traffic regulations and arrest theater ticket speculators. They can't do it. There are not enough of them to go around.

The District Attorney is in the same box. He cannot possibly prosecute all the crimes that are going on under our noses every day. It would take 10,000 District Attorneys and as many courts. We should all have to turn ourselves into volunteer policemen—and then arrest ourselves. The result is that the District Attorney, apart from those crimes which are brought to his attention by the person directly aggrieved, has to choose which he will prosecute. He can't clean up the whole town. Shall he go after Fifth avenue or Broadway or Greenwich Village? Investigate the Park Department, Bellevue Hospital or the Mayor? In the end he sits down somewhere, presumably in his office, and waits for trouble. When trouble arrives in the person of "Mr. Assmanshausen," who, introduced by Messrs. Dolan and Grady, tells him that the greatest crime in the history of Wall Street has been or is about to be committed in connection with the sale of the second mortgage bonds of the Tittlebat Tidewater Company, he has to fish or cut bait. And either course has its own special misery. For if he finds that somewhere tucked away in the complicated financing of the Tittlebat Company there is a genuine, if elusive, cause for criminal action he may have to spend weeks or months, employ expert accountants and assign half a dozen or more of his best men to the job of untangling a mass of contracts, guaranties, underwritings and loans in order to get at it while other matters are pushed aside and clamorous complainants forced to wait. And even then! After he has found a violation of some statute that will stand the acid test of a demurrer, has caught a legal cat that can be forced to fight—then, alas! he may know full well in his heart of hearts that the affair is too complicated ever to be elucidated to a common jury should indictments be found! Shall he out with it and say so? Shall he frankly admit that the criminal law is unsuited to cope with the iniquities of corporate finance—freely confess his helplessness after the newspapers have with one accord commended his assiduity in the Tittlebat matter? Or shall he go ahead and get his indictments with the secret knowledge that he will never try them, or, if he does, that he will go down to inevitable defeat? In any case, sooner or later, he will be accused of being under Wall Street influence—damned if he does, damned if he doesn't!

He is in an even harder position when he knows or suspects that the complainant is moved, not by a desire to have the wicked brought to justice, but to depress the market value of the stock of the corporation whose directors he accuses of crime. Just as there are persons who make a good living by threatening to procure injunctions to restrain what they claim to be the *ultra vires* acts of wealthy corporations or to make other sorts of trouble, so there are those who seek to stimulate the criminal authorities to begin proceedings against corporations of whose stock they have gone heavily short. During the period when the Metropolitan Street Railway system was under fire and an investigation of the transit situation was being conducted, the anxieties of certain prominent financiers as to the probable outcome and what the District Attorney might, or might not, do was almost as laughable as it was significant. The flimsiest excuses were utilized by these gentlemen to revamp acquaintances with members of the District Attorney's staff who might possibly shed some light on

what was going to happen; and over a cup of tea or stronger stimulant the most blatant and obvious attempts were made to draw out information from which the probable course of the stock market in street railways might be prognosticated. Whether the lawyer who laid the matter originally before the District Attorney was acting from an enlightened sense of public duty or was in the pay of some syndicate of brokers was, if I recall correctly, never clearly demonstrated. The unsavory character of such a complaint, however reluctant the prosecutor may be to cooperate in any stock jobbing enterprise, cannot limit his activity beyond justifying a refusal to lend his official assistance—certainly to any extent out of the ordinary—until the complaint has been passed upon in regular course by a magistrate. If it be there shown that the directors of the corporation have been violating the law it becomes his business to prosecute them in the regular way. He must present the matter to the Grand Jury, secure indictments and do all in his power to bring the alleged criminals to justice. Incidentally, he may be justified in securing another indictment against the complainant and his sponsors for blackmail.

Defects in Criminal Law.

The fundamental defect of the criminal law—a defect which can never be remedied—is that it does not concern itself with immoralities, sins or even wrongs, but only with a limited number of offenses most of which, if not all, carry with them, at least historically, a connotation of violence. If you draw a large circle on a piece of paper and put a dot in the center, with another tiny circle around it, it may suggest the relation borne by what our legislatures have designated as crimes to all those other acts which are equally, if not in certain cases more, despicable and reprehensible in their nature, but which have not been so classified. The dot itself may be taken to stand for such crimes as are discovered and actually punished. Now a "tort," that is a private wrong for which the perpetrator may be sued in the civil courts, may be far more odious than the violation of a criminal statute. A malicious man can be far meaner than a mere burglar, and his meanness more despicable in the sight of God and of man than any crime. No one can possibly explain why the Legislature has selected some acts for criminal legislation and overlooked others. A felony may or may not be morally worse than a misdemeanor, and some act, which has never been made a crime, worse than either. It is a crime to walk on the grass and a crime to murder your aunt, but it is not crime to publicly defame a woman's reputation by word of mouth. However, it is inconceivable that we should stigmatize as criminal everything of which we disapprove and expect to bring about the millennium by prosecuting everybody who was guilty of violating the Decalogue. Yes, we must recognize that the criminal law is arbitrary, crude, clumsy, archaic and unequal to dealing with the subtler devices of the Devil. The man in the street—our worthy "Assmanshausen,"—the "sucker" who has been trimmed in the bucket shop, the girl who has been slandered, the poor old woman who has bought oil or mining stock in a corporation which has only hopes for assets—do not know this. They not unnaturally think that because they have been wronged in a manner repugnant to morality, the offender must be subject to criminal prosecution. They cannot be made to understand that if some one has broken one of the Ten Commandments he has not necessarily committed a crime as well. They cannot be blamed, either. There is no "justice" in it. It is the mean man that cheats his confiding neighbor who deserves jail rather than the poor devil who knocks down the hooligan who has insulted his mother.

But, arbitrary as is the criminal law in its selection of what shall be called crimes, it is even more so in its operation. Policemen and prosecutors, judges and juries, are not only arbitrary but stupid, ignorant, and subject to influences of various sorts. An inferior table d'hôte has added many a year to the culprit's term who came up for sentence after luncheon. Some judges have a horror of burglary, some are peculiarly antipathetic to bigamy, while a

few think a man should be entitled to have as many wives as he can pay for. A judge in one corner of the Criminal Courts Building will be giving a defendant convicted of manslaughter twenty years, while another judge, in a court room diagonally opposite, will be sending a defendant no less guilty to the reformatory. It is not justice. Nobody pretends it is.

A Way to Justice.

The only way to have anything approaching equality in justice is to abolish the criminal law entirely and empower some wise and experienced citizen to send to prison all those who deserve to go there. And there should be no appeal; no criminal definitions or statutes. Anybody could accuse anybody else of anything that he thought deserving of condemnation and the Wise One would hear what each had to say, interrogate their witnesses, and send either or both to jail.

Many of the public have an idea that some system tantamount to this is even now in operation and that such a Wise One already exists in the person of the District Attorney, who has only to wave his hand to have the unrighteous swept from the face of the earth. Would that this were so! The failure of criminal justice is due less to the inadequacy of the substantive law of crimes, the ineffectiveness of criminal procedure, or the weakness of human nature, than to the inherent impossibility of arbitrarily differentiating between crime and sin. This cannot and never will be done. And for not accomplishing the impossible the District Attorney will always be blamed.

Over a quarter of a century ago our present Mr. Justice Holmes said:

"What have we better than a blind guess to show that the criminal law in its present form does not do more harm than good?"

I do not know how Judge Holmes answered or would have answered that question, nor am I entirely clear as to exactly what he had in mind. The inequalities of justice, the law's delays, the absurdity, ineffectuality and cruelty of putting people in jail, the proud man's wrong and the oppressor's contumely have been favorite subjects of rhetoric, poetry and irony from the time of Solon to that of Bernard Shaw. But I am an optimist. I believe that the criminal law in its present form is a lot better than nothing. I even go further. I regard it as most encouraging that such a slight leaven of successful prosecution should have the salutary effect it does on the lump of humanity.

Yet while the criminal law may be a vain attempt to render the Day of Judgment superfluous, and while it is doubtless susceptible of immeasurable improvement, it would be good enough to muddle along with provided we could get the right sort of prosecutors to administer it. That is the trouble with most human institutions—and the criminal law is no exception. The work of the Cleveland Foundation in its recently completed survey of the administration of criminal justice in Cleveland, Ohio, is both thorough and admirable. Commenting upon its report the *New Republic* says: "In the mind of the average citizen the failure of our criminal law to accomplish its purpose is doubtless ascribed largely to the personal delinquencies of the individual human beings who at a given time are charged with its administration. Perhaps the most notable thing about the Cleveland survey is that it proceeds in utter disregard of this popular notion."

A survey into the efficiency of the law as constituted could hardly proceed otherwise. It must assume that a good law is capable of proper enforcement. Its task is the study of institutions and not men. But personally I share the opinion of what the *New Republic* calls "the average citizen." I believe that nine times out of ten the failure of justice is due to the fellow who pretends to administer it. And in this I am sure that Mr. Assmanshausen agrees with me.

The Attributes Needed.

Common sense and honesty, not cleverness and oratorical ability, are the attributes needed in a prosecutor. Yet because of the tradition that the District Attorney should be a professional legal prize fighter candidates for that office are often chosen for their demagogic qualities. However, I have never observed that eloquence in a prosecutor added noticeably to his success

with the jury. They may enjoy listening to his oratorical fireworks for a limited time, but in these sophisticated days they are apt to regard the speeches of counsel as a necessary evil only, and most of the highfalutin as "hot air" and "bull." Courts of law have lost most of their awe and mystery for the ordinary citizen largely through his knowledge that even if the judges and prosecutors are honest and able men they generally owe their jobs to politics; and jurors are no longer so ignorant that the mellifluous voice of a silver-tongued orator can deprive them of their powers of reason. They are apt to be governed by the facts—which is a long step in advance over what used to be the case and is so still in some parts of our country even to-day.

What is the test of a successful District Attorney? How are the people to know whether the prosecutor is on his job or whether he is better or worse than his predecessor unless the newspapers tell them so? Cannot his industry be estimated and his ability measured by his results as indicated in the records? Not very satisfactorily. For the mere number of indictments found by the Grand Jury under his guidance do not necessarily prove anything as to his personal efficiency. They may indicate greater or less police activity, or an increase or decrease in the amount of crime itself. The volume of indictments has no significance whatever—it may be that none of them should have been found and that all of them will have ultimately to be dismissed, or that there should have been twice as many. Similarly no comparison between the number of cases "disposed of" by one District Attorney, as contrasted with the number handled by another, furnishes any test of effectiveness, for the "disposition" may be merely a wholesale jail delivery by "recommendations of dismissal," and the so-called "disposition" the very worst disposition possible. In point of fact a paucity, rather than a multiplicity, of indictments may well indicate that the District Attorney knows his business and is doing it effectively, i. e., is throwing out the "Assmanshausens" instead of yielding to his own desire to oblige, and clogging the calendars with hopeless cases.

Desires "Dead Open and Shut Cases."

Moreover, the fact that the District Attorney secures convictions in almost all his prosecutions proves nothing either; it may only tend to show that he is unwilling to find indictments in other than "dead open and shut cases," that is, cases where there is no possibility of an acquittal. Such a prosecutor is even more dangerous than the amiable begetter of Assmanshausens, for the police will quickly become discouraged if the District Attorney insists that no crook shall be put on trial who is not caught with a revolver in his hand or a stolen necklace in his pocket. A hundred per cent. batting average in the trial of cases, without any acquittals, and an equal ratio of convictions to the total number of indictments found, would in fact justify the suspicion that the prosecutor was running his office for the sole purpose of self-glorification.

How, then, are the taxpayers to know a "good" District Attorney when they see one? The only answer is that they can't. The statistics of his office are practically valueless to help us. If there were something definite to start from—say an average ratio of convictions to indictments, covering a great number of years, taken in conjunction with an average ratio of indictments to the county's population, it might from mere figures be possible to guess at the prosecutor's activity and efficiency. But it would be only a guess, and a bad one at that, for it would necessarily be based on the assumption that police activity and efficiency remained constant throughout the whole period. No, statistics can aid us but little. The only way to determine what sort of a District Attorney is in office is to watch his action in cases where the presumptive facts are public property, and where each step in the proceedings is known. Then and then only is it possible to form an opinion as to what influences are guiding his course and whether he and his assistants were appointed because of their integrity, assiduity or ability rather than an account of their consanguinity to persons of political

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